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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
12

13 MICHAEL LAVIGNE, *et al.*,
14 Plaintiffs,
15 vs.
16 HERBALIFE LTD., *et al.*,
17 Defendants.
18

CASE NO. 2:18-cv-07480-JAK (MRWx)
[Related Case 2:13-cv-02488-BRO-RZ]

**HERBALIFE'S NOTICE OF
MOTION AND MOTION TO
DISMISS AMENDED COMPLAINT**

Date: March 9, 2020
Time: 8:30 A.M.
Crtrm.: 10B

Assigned to Hon. John A. Kronstadt

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on March 9, 2020 at 8:30 A.M., or as soon
 3 thereafter as this matter may be heard in the above-entitled court, before the
 4 Honorable John A. Kronstadt, United States District Judge for the Central District of
 5 California, Western Division, located at 350 W. First Street, Los Angeles, California
 6 90012, in Courtroom 10B, Defendant Herbalife International of America, Inc.
 7 (“Herbalife”) will, and hereby does, move pursuant to Fed. R. Civ. P. 12(b)(6) for an
 8 order dismissing Plaintiffs Jeff Rodgers, Patricia Rodgers, Jennifer Ribalta, and
 9 Izaar Valdez’s Amended Complaint (the “Complaint”). The motion is based on the
 10 following grounds:

- 11 • Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), Plaintiffs fail to state
 12 a claim upon which relief may be granted with respect to Count I
 13 (conducting the affairs of a civil RICO enterprise) and Count II
 14 (conspiracy to violate civil RICO) because Plaintiffs fail to plead
 15 (a) the underlying fraud allegations with particularity and (b) that the
 16 alleged predicate acts proximately caused their losses.
- 17 • Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), Plaintiffs fail to state
 18 a claim upon which relief may be granted with respect to Count III
 19 (violation of California’s Unfair Competition Law) and Count IV
 20 (negligent misrepresentation) because they fail to plead the underlying
 21 fraud allegations with particularity.

22 The motion is based upon this Notice of Motion, the attached Memorandum
 23 of Points and Authorities, the pleadings on file, and such other evidence and
 24 argument as the Court may receive.

25 Pursuant to Local Rule 7-3, counsel for Herbalife apprised Plaintiffs’ counsel
 26 of the bases for its motion on November 18, 2019, and attempted to meet and confer
 27 with Plaintiffs’ counsel on multiple occasions. Plaintiffs never expressed their
 28 availability to meet and confer.

1 DATED: November 26, 2019

Respectfully submitted,

2 Mark T. Drooks

3 Paul S. Chan

4 Gopi K. Panchapakesan

Bird, Marella, Boxer, Wolpert, Nessim,

5 Drooks, Lincenberg & Rhow, P.C.

6
7 By: /s/ Mark T. Drooks

8 Mark T. Drooks

9 Attorneys for Defendant Herbalife

International of America, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs ignore the defects observed by the Court in its October 22, 2019 Order (the “Order”). The Order dismissed the original complaint because Plaintiffs had not pled with specificity any fraudulent actions taken by Herbalife, as opposed to the actions taken by the 44 “Florida Defendants.” The Amended Complaint instead merely eliminates two of the three Herbalife defendants and re-brands the Florida Defendants as “Featured Speakers”—an undefined group of about 100 of Herbalife’s top distributors. These cosmetic changes do not fix anything. Having had over two years to plead sufficient claims against Herbalife—and over a year of discovery to investigate those alleged claims—the Amended Complaint makes unmistakably clear that there is no set of facts under which Herbalife could be liable for these individual Plaintiffs’ purported losses.

Plaintiffs’ RICO claims fail for two reasons. First, the Amended Complaint does not plead with particularity Herbalife’s role in the underlying alleged fraud—namely, the purported failure of unidentified Featured Speakers to disclose at events that they did not achieve success through event attendance, but rather did so through illegitimate practices. That Herbalife may have promoted some of the events at which these speakers appeared does not establish fraud under Rule 9(b). Among other things, the Amended Complaint does not even specify which Featured Speakers engaged in any banned practices, the specific events at which these Featured Speakers failed to make any necessary disclosures, Herbalife’s knowledge that these Featured Speakers made the alleged false statements, or Herbalife’s purported participation in that conduct. Not only does the Amended Complaint force the Court and Herbalife to connect the dots—which is itself a defect—it does not even allege the dots required under Rule 9(b).

Second, Plaintiffs fail to plead under RICO that their alleged losses—event expenditures—were proximately caused by the alleged predicate acts, Herbalife’s

1 promotion of events. RICO's proximate causation requirement is stringent; that
2 Plaintiffs would not have attended events "but for" Herbalife's promotion of them is
3 insufficient. Plaintiffs also must allege that Herbalife's promotion of events—as
4 opposed to the conduct and representations of third parties—directly caused their
5 injuries; they cannot and do not do so. Similarly, implicit in Plaintiffs' RICO claims
6 is that their investment in events did not pay off because they did not profit from the
7 Herbalife business opportunity. But there are multiple factors that could have
8 contributed to their failure, like their sales skills, their business inexperience, or
9 local demand for Herbalife product. Plaintiffs cannot plausibly allege that the
10 promotion of events—and no other factor—directly caused their business failures.
11 Therefore, under well-settled law, Plaintiffs cannot plead proximate causation under
12 civil RICO.

13 Plaintiffs' state-law claims fail as well. Their claim for negligent
14 misrepresentation is not pled with the requisite specificity under Rule 9(b). Further,
15 Plaintiffs fail to specify which representations made by Herbalife—as opposed to
16 those made by third parties—they relied upon in attending events. For the same
17 reasons, Plaintiffs claim under California's Unfair Competition Law ("UCL")—
18 which is premised on the same alleged misrepresentations—is insufficiently pled.

19 The Court should dismiss Plaintiffs' claims with prejudice. Further
20 amendment would be futile here. Despite conducting extensive discovery, Plaintiffs
21 have not pled sufficient claims against Herbalife. There is no reason to believe that
22 another round of pleading would remedy the deficiencies inherent in their claims.

23 **II. RELEVANT BACKGROUND**

24 **A. Plaintiffs' Original Complaint**

25 Plaintiffs originally sued three Herbalife entities and the 44 Florida
26 Defendants in the District Court for the Southern District of Florida on
27 September 18, 2017. Dkt. 1. The claims of four of the original plaintiffs, who had
28 joined Herbalife before 2009 or after 2013, were compelled to arbitration. Dkt. 106.

1 The claims of the remaining four plaintiffs, Patricia Rodgers, Jeff Rodgers, Jennifer
2 Ribalta, and Izaar Valdez, were transferred to this Court pursuant to valid forum
3 selection clauses. *Id.* Plaintiffs' claims against the Florida Defendants remain in the
4 Southern District of Florida. *Id.* That case has been stayed pending an appeal of the
5 District Court's order denying the Florida Defendants' motion to compel arbitration.

6 **B. The Court's Order Dismissing Plaintiffs' Original Complaint**

7 Herbalife moved to dismiss the original complaint on September 28, 2018.
8 Dkt. 142. The Court heard Herbalife's motion on February 11, 2019, and took the
9 matter under submission. Dkt. 163. On October 22, 2019, the Court granted
10 Herbalife's motion, without prejudice as to the filing of an amended complaint.
11 Dkt. 196. The Court held that Plaintiffs had failed to plead their claims with
12 particularity under Rule 9(b). *See id.* at 10, 13-15.

13 As to Plaintiffs' RICO claims, the Court held that "[t]he Complaint does not
14 include allegations as to any specific actions taken by wire by any single Herbalife
15 Defendant," as opposed to the Florida Defendants. *Id.* at 9. The Court further
16 observed that "[a]ctions that could be attributed to one or more of the Herbalife
17 Defendants are alleged as to either or all defendants, *inclusive of the claims against*
18 *those Individual Defendants* that were not transferred to this District" *Id.* at 10
19 (emphasis added) (citing Dkt. 1 at ¶¶ 96-97). For example, the original complaint
20 alleged that "a flier for an event 'was originally published to Defendant Herbalife's
21 various websites,' with 'hopeful distributors repackag[ing] the flier and pass[ing] it
22 along through the wires" without specifying "which, if any, of the Individual or
23 Herbalife Defendants published something on the websites, or to which websites."
24 *Id.* at 10 (quoting Dkt. 1 at ¶¶ 98-100); *see also id.* ("Plaintiffs also cite an internet
25 advertisement for an event that 'was posted by new president[']s team member, Bill
26 Garvey & reposted by Pres Team Lori Baker.") (quoting Dkt. 1-7; Dkt. 1 at ¶¶ 84-
27 85). The Court concluded that Plaintiffs had not alleged Herbalife's "role in these
28 actions." *Id.*

1 The Court found that Plaintiffs’ state law claims also are subject to Rule 9(b)
2 and suffered from the same pleading defect as their RICO claims. *Id.* at 13-15
3 (“[T]he allegations against Herbalife are stated in general terms” and are
4 “insufficient for the same reasons stated . . . with respect to the RICO fraud claim.”)
5 (citing Dkt. 1 at ¶ 372).

6 C. Plaintiffs’ Amended Complaint

7 The Amended Complaint asserts claims only against Herbalife International
8 of America, Inc. (“Herbalife”), specifically RICO claims under 18 U.S.C. § 1962(c)
9 (conducting the affairs of a racketeering enterprise) and § 1962(d) (conspiracy), a
10 claim under the UCL, and a claim for negligent misrepresentation. Plaintiffs no
11 longer allege a claim for unjust enrichment. The Amended Complaint also no
12 longer refers to the 44 Florida Defendants. Instead, it alleges the existence of
13 “Featured Speakers,” an undefined group of Herbalife’s “most active and highest-
14 ranking members,” of whom Plaintiffs estimate there are 100 and with whom
15 Plaintiffs contend Herbalife conspired to defraud event attendees. Dkt. 202 at ¶¶ 6,
16 212. Plaintiffs allege that they themselves ultimately were not successful in
17 pursuing the Herbalife business opportunity, despite attending events. *See, e.g., id.*
18 at ¶¶ 4-5, 9-10, 173-174, 181.

19 1. The Amended Complaint Lacks Allegations That Tie 20 Herbalife to the Alleged Conduct of the Featured Speakers.

21 The central allegation of the Amended Complaint is that some (but not all)
22 Featured Speakers contend they achieved success by attending both corporate and
23 distributor-run events, without disclosing to event attendees that their success is
24 “largely attributable” to their alleged use of “banned methods.” Dkt. 202 at ¶ 6, 21,
25 27-50. But Plaintiffs do not specify which “Featured Speakers” engaged in these
26 alleged methods or the events at which they failed to disclose their use of these
27 methods. *See, e.g.,* at ¶ 40 (alleging merely that “high volume cross-border
28 transactions presents the *opportunity* for top distributors to generate illegal profits

1 impossible for new recruits.”) (emphasis added); ¶ 42 (“*Certain* Presidents’ Team
2 members have profited greatly from an undisclosed currency arbitrage scheme.”)
3 (emphasis added). And while the Amended Complaint generally alleges that
4 Herbalife “promotes” and “parade[s] around the country” some of these speakers, it
5 pleads no facts suggesting that Herbalife had any role in either (a) their alleged use
6 of certain illegitimate business practices or (b) their alleged failure to disclose their
7 use of these practices at events. *Id.* at ¶¶ 22, 27.

8 **2. Plaintiffs’ New Allegations Against Herbalife Are**
9 **Contradicted by the Amended Complaint’s Own Exhibit.**

10 The Amended Complaint references and attaches Herbalife’s speaker
11 guidelines, alleging that Herbalife requires any income claims made at events to be
12 substantiated. *Id.* at ¶ 65. Plaintiffs’ allegations regarding Herbalife’s speaker
13 guidelines contradict their central theory that Herbalife deliberately defrauded
14 event-goers. The guidelines themselves, attached as Exhibit 5 to the Amended
15 Complaint, note that “[p]resentations must include income . . . disclaimers as
16 required” and advise speakers to “keep lifestyle photos to a minimum” and that any
17 such photos “must include the income disclaimer.” Dkt. 202-6 at 2-3. The
18 guidelines further provide that speakers who do not timely submit their
19 presentations for review “risk not being permitted to present.” *Id.* Although
20 Plaintiffs allege that the guidelines are not enforced in connection with distributor-
21 run Success Training Seminars (“STS”), “because of the sheer ‘number of events,’”
22 (*id.* at ¶ 66), Plaintiffs do not challenge the guidelines’ applicability to corporate
23 events. Plaintiffs also allege that Herbalife provides certain “core training
24 materials” to Featured Speakers who run STS events. *Id.* at ¶ 79. Importantly,
25 Plaintiffs do not allege that anything about these training materials is fraudulent.

26 The Amended Complaint further alleges that Herbalife promoted certain
27 events through its website and marketing mailings and emails. *Id.* at ¶¶ 98-114.
28 The specific examples cited in the Amended Complaint, state, among other things:

1 “Sharpen your skills and take your team to the next level,” “All things Herbalife
2 Extravaganza just a few clicks away,” “Ignite Your Business,” and that “the
3 event . . . will help you build your future.” *Id.* at ¶¶ 102, 103, 105, 107. Plaintiffs
4 do not allege that these benign statements are false.

5 **III. ARGUMENT**

6 **A. Plaintiffs’ RICO Claims Fail.**

7 **1. The Amended Complaint Fails to Plead the Underlying**
8 **Fraud with Particularity.**

9 **a. Rule 9(b) Applies to Plaintiffs’ RICO Claims.**

10 Rule 9(b) applies to the alleged predicate acts of wire fraud and mail fraud.
11 *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, &*
12 *Prod. Liab. Litig.*, 826 F. Supp. 2d 1180, 1201 (C.D. Cal. 2011) (“In the context of
13 RICO, Rule 9(b) requires that the Plaintiffs ‘detail with particularity the time, place,
14 and manner of each act of fraud, plus the role of each defendant in each scheme.’”) (quoting *Lancaster Cnty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405
15 (9th Cir. 1991)); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)
16 (Rule 9(b) “requires more specificity including an account of the time, place, and
17 specific content of the false representations as well as the identities of the parties to
18 the misrepresentations.”).¹

19
20 As to wire fraud, a RICO plaintiff must allege “(1) the formation of a scheme
21 or artifice to defraud; (2) use of the United States wires or causing a use of the
22 United States wires in furtherance of the scheme; and (3) specific intent to deceive
23 or defraud.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393,
24 1400 (9th Cir. 1986). The requirements for mail fraud are identical, the only
25 difference being that a plaintiff must allege the use of the mails in furtherance of the
26

27
28 ¹ Unless otherwise noted, internal citations and quotation marks have been omitted.

1 alleged scheme. *Id.*

2 **b. Plaintiffs Fail to Plead with Specificity Herbalife’s**
3 **Participation in the Featured Speakers’ Alleged**
4 **Misrepresentations.**

5 Plaintiffs do not plead with specificity under Rule 9(b) what Herbalife’s
6 purported role is with respect to the underlying alleged fraud—that so-called
7 Featured Speakers did not achieve success through event attendance, but represented
8 otherwise to event attendees. *See, e.g.*, Dkt. 202 at ¶¶ 21, 30. Instead, Plaintiffs
9 allege, in cursory fashion, that Herbalife “encourages” these distributors to “promote
10 the events;” has “actual knowledge” that the event-related claims made by the
11 Featured Speakers are false; and “promotes a steady stream of” such speakers and
12 “parade[s]” them “around the country.” *Id.* at ¶¶ 2, 21, 22, 27. These conclusory
13 allegations do not come close to meeting Rule 9(b)’s heightened pleading standard.
14 The Amended Complaint falls into the same trap as the original complaint—
15 impermissibly attributing to Herbalife representations made by third parties
16 (including the Florida Defendants), without specifically alleging that Herbalife
17 participated in those representations. Dkt. 196 at 10.²

18 *Swartz* is instructive here. There, the complaint was “shot through with
19 general allegations that the ‘defendants’ engaged in fraudulent conduct but attributes
20 specific misconduct only to” certain other defendants. *Swartz*, 476 F.3d at 765. The
21 Ninth Circuit affirmed the dismissal of plaintiff’s fraud claim against the defendants
22 in question, holding that “[c]onclusory allegations that [defendants] ‘knew that [the
23 other defendants] were making . . . false statements . . . and thus were acting in
24 concert with [the other defendants]’ and ‘were acting as agents [of the other
25 defendants]’ and were ‘active participants in the conspiracy’ without any stated

26
27 ² In any event, Plaintiffs do not even allege that the representations made to them
28 by certain Featured Speakers were false. *See, e.g.*, Dkt. 202 at ¶¶ 164, 166, 176,
182, 184, 188-89, 191.

1 factual basis are insufficient as a matter of law.” *Id.* Here too, the Amended
2 Complaint does not allege—other than in conclusory terms—Herbalife’s role in the
3 Featured Speakers’ alleged failure to disclose to event-goers their use of certain
4 “banned” practices.

5 Further, the Amended Complaint’s unworkably vague definition of “Featured
6 Speakers” as Herbalife’s “most active and highest-ranking members”—not all of
7 whom are Florida Defendants or even identified by name—renders the alleged fraud
8 that forms the basis for Plaintiffs’ RICO claims totally indiscernible. Who are the
9 Featured Speakers? Which alleged “banned” practices did each of them employ?³
10 When and how did Herbalife become aware of each of these unnamed Featured
11 Speakers’ use of such practices? At which events did the Featured Speakers fail to
12 disclose their use of such practices? When and how did Herbalife specifically
13 promote the Featured Speakers who engaged in these practices? When and how did
14 Herbalife become aware of the Featured Speakers’ alleged failure to disclose their
15 use of such practices at events? Even more generally, under what circumstances
16 were these alleged misrepresentations made at what the Amended Complaint
17 describes as “thousands” of events that occurred over the period that the plaintiffs
18 have put at issue? These are all essential questions that the Amended Complaint
19 does not even attempt to answer. *See Bly-Magee v. California*, 236 F.3d 1014, 1019
20 (9th Cir. 2001) (“To comply with Rule 9(b), allegations of fraud must be specific
21 enough to give defendants notice of the particular misconduct which is alleged to
22 constitute the fraud charged so that they can defend against the charge and not just

23
24 ³ The Amended Complaint makes outlandish and speculative claims of, among
25 other things, money laundering and currency arbitrage, without alleging who, if
26 anyone, actually engaged in these practices. Dkt. 202 at ¶¶ 40-43. These
27 allegations should be rejected. *See Sprewell v. Golden State Warriors*, 266 F.3d
28 979, 988 (9th Cir.), *opinion amended on denial of reh’g*, 275 F.3d 1187 (9th Cir.
2001) (courts are not “required to accept as true allegations that are merely
conclusory, unwarranted deductions of fact, or unreasonable inferences.”).

deny that they have done anything wrong.”).

c. The Amended Complaint Does Not Even Address the Allegations That the Court Found to Be Deficient Under Rule 9(b).

As demonstrated by the below chart, Plaintiffs have not even fixed the original complaint’s deficient allegations that the Court specifically identified in the Order. *See* Dkt. 196 at 10. The redlines in the right-hand column demonstrate that Plaintiffs made only cosmetic changes to these defective allegations:

Allegation in Original Complaint	Allegation in Amended Complaint
“Defendants expect and encourage their Circle of Success promotional messages to be remixed and echoed across the wires via the social media accounts of event participants. Each event flier published by Defendants generates thousands of clone publications in the months leading up to the event.” Dkt. 1 at ¶ 97; <i>see</i> Dkt. 196 at 10.	“ Defendants <u>Herbalife and its Featured Speakers</u> expect and encourage their Circle of Success promotional messages to be remixed and echoed across the wires via the social media accounts of event participants. Each event flier published by Defendants Herbalife generates thousands of clone publications in the months leading up to the event.” Dkt. 202 at ¶ 120.
“For example, the flier for the October 3-5, 2014, LDW in Jacksonville was originally published to Defendant Herbalife’s various websites. Regional leadership then republished the flier over their event websites and social media feeds. In the final step, hopeful distributors repackaged the flier and passed it along through the wires to their own social networks.” Dkt. 1 at ¶¶ 98-99; <i>see</i> Dkt. 196 at 10.	“For example, the flier for the October 3–5, 2014, LDW in Jacksonville was originally published to Defendant Herbalife’s various <u>event</u> websites. Regional leadership then republished the flier over their event websites and social media feeds. In the final step, hopeful distributors repackaged the flier and passed it along through the wires to their own social networks.” Dkt. 202 at ¶¶ 121-122.
“Extravaganza is billed as ‘the BIGGEST and MOST IMPORTANT event to attend’ on the Circle of Success calendar.” Dkt. 1 at ¶ 84 (citing Dkt. 1-7); <i>see</i> Dkt. 196 at 10.	“Extravaganza is billed as ‘the BIGGEST and MOST IMPORTANT event to attend’ on the Circle of Success calendar.” Dkt. 202 at ¶ 91 (citing Dkt. 202-10) (the exhibit remains unchanged).
“Herbalife’s STS system is owned and controlled by a web of Defendant	“Herbalife’s STS system is owned and controlled by a web of Defendant

Allegation in Original Complaint	Allegation in Amended Complaint
connected entities. There are currently more than sixty ever-changing U.S. based STS websites registered to various distributors. Some of the site registrations are private or registered to mid-level proxies but many are registered to one of the President’s Team members controlling a local area for Herbalife.” Dkt. 1 at ¶ 71.	connected entities. There are currently more than sixty ever-changing U.S. based STS websites registered to various distributors. Some of the site registrations are private or registered to mid-level proxies, but many are registered to one of the President’s Team members controlling a local area for Herbalife.” Dkt. 202 at ¶ 76.

Merely changing the “Herbalife Defendants” to “Herbalife” or “Individual Defendants” to “Featured Speakers” (a loosely defined group that appears to include some, but not all, of the Florida Defendants) fails to address the Court’s concerns that (1) actions that “could be attributed” to Herbalife also are alleged as to the re-branded “Featured Speakers” without distinguishing which actions were taken by which parties and (2) these allegations lack specificity as to “the time, place and method of transmission.” Dkt. 196 at 10.

**d. Plaintiffs’ New Allegations Regarding Herbalife’s
Promotion of Events Are Insufficient Under Rule 9(b).**

The Amended Complaint’s allegations regarding statements made by Herbalife on its website, in magazines, and through other media regarding events do not save its RICO (and other fraud-based) claims. Those allegations indicate only that Herbalife promoted certain events with generic statements like, “Sharpen your skills,” “Ignite Your Business,” and “learn to build a more successful business.” Dkt. 202 at ¶¶ 102, 103, 105. Not only are statements like these puffery,⁴ but the Amended Complaint fails to connect these benign statements to the Featured Speakers’ alleged failure to disclose at events the manner in which they achieved

⁴ See *Cty. of Marin v. Deloitte Consulting LLP*, 836 F. Supp. 2d 1030, 1039 (N.D. Cal. 2011) (puffery is characterized by “vague, exaggerated, generalized or highly subjective statements regarding a product or business which do not make specific claims.”).

1 success. *DeSoto v. Condon*, No. SACV08514AHSMLGX, 2008 WL 11338233, at
2 *7 (C.D. Cal. July 18, 2008) (“While plaintiffs’ FAC sets forth certain dates,
3 amounts, and particular transactions between various individuals, the FAC fails to
4 allege the intent to engage in a scheme or outline a scheme to defraud in a manner
5 that allows the Court to draw the inference that the predicate acts show the existence
6 of a scheme furthered through mail and wire transactions.”); *Gintowt v. TL*
7 *Ventures*, 226 F. Supp. 2d 672, 678 (E.D. Pa. 2002) (despite the complaint’s
8 “extraordinary length,” “even viewing together the many ‘dots’ of fraud alleged,
9 Plaintiff’s Complaint . . . fails to connect those dots in the language and particulars
10 of RICO.”).⁵

11 Further, the exhibits containing those innocuous statements confirm that they
12 were made only in connection with corporate events, like the Extravaganza and
13 Spectacular. *See, e.g.*, Dkts. 202-12, 202-13, 202-14. There are no specific
14 allegations, however, tying Herbalife to the alleged statements made by Featured
15 Speakers at or in connection with much more numerous distributor-run events, like
16 STSs. *See, e.g.*, Dkt. 202 at ¶ 117 (failing to allege that Herbalife reviewed,
17 approved, or promoted the alleged testimonials contained in the referenced fliers);
18 ¶¶ 78, 80 (admitting that “top distributors” receive all of the revenues from STS
19 ticket sales and run the events themselves). Plaintiffs also do not allege that
20 anything contained in the training materials Herbalife provides for such events is
21 fraudulent. *Id.* at ¶ 79. Nor do general allegations that Herbalife sometimes
22 “provides product and marketing” for STSs or that there is a “web” of unspecified
23

24 ⁵ Plaintiffs’ references to statements made in *Herbalife Today* from July 2011 and
25 June 2012 should be disregarded because they pre-date the relevant period under the
26 applicable statutes of limitations, the longest of which is RICO’s four-year statute.
27 Plaintiffs do not allege that their claims should be tolled under the delayed discovery
28 rule. *See Henderson v. J.M. Smucker Co.*, No. CV-10-4524-GHK-VBK, 2011 WL
1050637, at *2 (C.D. Cal. Mar. 17, 2011) (requiring that a plaintiff plead specific
facts justifying the application of the delayed discovery rule).

1 “entities” who own and control STSs satisfy Rule 9(b)’s heightened pleading
2 standard. *Id.* at ¶¶ 76, 78.⁶

3 To the extent Plaintiffs’ allegations of mail and wire fraud are premised on
4 a failure to disclose, they are insufficient for an additional reason. The Amended
5 Complaint does not plead—other than in conclusory fashion—that Herbalife had
6 a fiduciary or statutory duty to make certain disclosures to Plaintiffs. *See Big O*
7 *Relief v. Cty. of Kern*, No. 117CV01566LJOBAM, 2018 WL 1210976, at *6 (E.D.
8 Cal. Mar. 8, 2018) (“Absent an independent duty, such as a fiduciary duty or an
9 explicit statutory duty, failure to disclose cannot be the basis of a [RICO] fraudulent
10 scheme.”); Dkt. 202 at ¶ 222.

11 **e. Plaintiffs’ Theory of Fraud Is Contradicted by Their**
12 **Own Allegations.**

13 Plaintiffs central fraud allegation against Herbalife—that it promoted event
14 speakers who failed to disclose the manner in which they actually achieved
15 success—is directly contradicted by Plaintiffs’ new allegation that Herbalife issues
16 speaker guidelines governing the accuracy of statements made at events. Dkt. 202
17 at ¶¶ 64-66; Dkt. 202-6; *see Sprewell*, 266 F.3d at 988 (9th Cir.) (a court “need not .
18 . . accept as true allegations that contradict matters properly subject to judicial notice
19 or by exhibit.”). Those guidelines, attached as Exhibit 5 to the Amended Complaint,
20 expressly require event speakers to (1) provide detailed substantiation regarding
21 anticipated earnings claims and (2) include a disclaimer along with any such claims.
22 Dkt. 202-6 at 2-3.

23 Plaintiffs’ fraud allegations collapse under the weight of their admission that
24 _____

25 ⁶ The allegation that Herbalife circulated a presentation to certain speakers stating
26 that “my ability to grow a royalty check is completely dependent on my ability to
27 get people to events” is a non-sequitur. Dkt. 202 at ¶ 59. That presentation says
28 nothing about the value of event *attendance*, as opposed to inviting others to attend
events. Plaintiffs do not contend that they suffered losses by virtue of inviting
others to attend events.

Herbalife has a policy in place to address the accuracy of the content presented by event speakers. *See Gustafson v. BAC Home Loans Servicing, LP*, No. SACV 11-915-JST ANX, 2012 WL 7071488, at *6 (C.D. Cal. Dec. 26, 2012) (“Plaintiffs are unable to state their fraud allegations with any particularity without contradicting what is expressly alleged in the TAC and included within the TAC’s exhibits.”). Plaintiffs’ allegations about those guidelines only further demonstrate the insufficiency of their theory of fraud. Plaintiffs allege only that “Herbalife does not enforce these guidelines” because it does not require presentations made at STS events to be reviewed given the high volume of those events that take place each year. Dkt. 202 at ¶ 66. Herbalife’s purported failure to consistently enforce its speaker guidelines, however, does not amount to a scheme to defraud under RICO. *See Gustafson*, 2012 WL at *6 (“A scheme to defraud requires ‘an affirmative, material misrepresentation’ or the nondisclosure of facts where there exists an independent duty to disclose.”) (quoting *United States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986)).

2. The Amended Complaint Does Not Plead That the Alleged Predicate Acts Proximately Caused Plaintiffs’ Losses.

a. RICO’s Proximate Causation Requirement Is Stringent.

A civil RICO plaintiff “is required to show that a RICO predicate offense not only was a ‘but for’ cause of his injury, but was the proximate cause as well.” *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010). The Ninth Circuit applies a three-factor test to determine whether an injury is “too remote” to allow recovery under RICO, specifically “(1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff’s damages attributable to defendant’s wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the

1 risk of multiple recoveries.” *Ass’n of Washington Pub. Hosp. Districts v. Philip*
2 *Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001).

3 **b. Plaintiffs’ Own Allegations Demonstrate That RICO’s**
4 **Proximate Causation Requirement Cannot Be Met**
5 **Here.**

6 At the most basic level, Plaintiffs do not allege that any predicate acts
7 purportedly committed by Herbalife—namely, the promotion of events through their
8 website and other media—proximately caused their losses. *See, e.g.*, Dkt. 202 at
9 ¶¶ 102, 103, 105, 107, 109. Plaintiffs instead allege that those losses—the amounts
10 they spent attending events—resulted from the failure of certain event speakers to
11 disclose the manner in which they earned money pursuing the business opportunity.
12 *Id.* at ¶ 21, 27. That Plaintiffs may not have attended those events “but for”
13 Herbalife’s promotion of them is not sufficient to establish proximate causation
14 under RICO. *See Hemi*, 559 U.S. at 9.

15 *Doe v. Trump Corp.*, 385 F. Supp. 3d 265 (S.D.N.Y. 2019) is instructive here.
16 In *Trump*, the plaintiffs sought to represent a nationwide class of individuals who
17 allegedly pursued multi-level marketing programs, including the “ACN
18 Opportunity,” as “independent business owners” (“IBO”). *Id.* at 271. They alleged
19 that “[k]ey to ACN’s recruiting operation are small group events hosted by IBOs in
20 their own homes or at local hotels and event spaces,” as well as national
21 conventions. *Id.* The plaintiffs alleged that senior ACN members told them they
22 had to attend events to be successful, that they felt “substantial pressure to do so,”
23 and that they were “criticized and shunned” by senior members when they did not
24 do so. *Id.* at 272-73. They also alleged that the defendants misled them into
25 believing that the business opportunity “offered a reasonable probability of success”
26 and that Trump “falsely represented” his reasons for supporting the opportunity,
27 failing to disclose that he did so only because he was being paid to endorse it. *Id.*
28 Among other things, the plaintiffs sought as damages the expenses they incurred in

1 attending such events. *Id.* at 272-73.

2 The Court dismissed the plaintiffs' RICO claims for failure to allege
3 proximate cause, holding that "[n]umerous intervening factors may account for
4 [p]laintiffs' inability to recover their investments," aside from defendant's conduct:

5 Plaintiffs' lack of success could be attributable to the
6 inherent challenges of multi-level marketing, Plaintiffs'
7 capabilities as salespeople and the extent of Plaintiffs'
8 existing networks to whom Plaintiffs could sell ACN
9 products and recruit new IBOs. The losses may also be
10 attributable to the market for ACN products in the
11 Plaintiffs' localities and ACN's business practices –
12 legitimate or otherwise – separate from Defendants' role.
These factors, contributing in whole or part to Plaintiffs'
losses, make the question of Defendants' responsibility the
sort of 'intricate, uncertain inquir[y]' that the proximate
cause requirement is intended to avert.

13 *Id.* at 280 (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006)).

14 The Court further observed that the conduct of third parties, namely those
15 who recruited Plaintiffs into the ACN opportunity and encouraged them to attend
16 events, "bears on the question of proximate cause" and further "attenuat[es] the link
17 between Defendants' conduct and Plaintiffs' losses." *Id.* at 280-81.

18 The facts here are very similar to those in *Trump*. Implicit in Plaintiffs'
19 allegations is that they did not recoup their investment in events through their
20 pursuit of the Herbalife business opportunity. *See* Dkt. 202 at ¶ 4 ("The events are
21 pitched as the guaranteed pathway to attaining life changing financial success with
22 the multi-level marketing business opportunity sold by Defendant Herbalife."). If
23 they had been successful, and the events they attended helped them successfully
24 pursue the business opportunity at a profit, then they would have no claim here.
25 Thus, like the plaintiffs in *Trump*, the Court must analyze the proximate causation
26 issue with reference to Plaintiffs "net loss[es]" rather than their "expenditures."
27 *Trump*, 385 F. Supp. 3d at 272.

28 As a result, the latter two factors that the Ninth Circuit considers in analyzing

1 proximate causation under RICO are dispositive here and require the dismissal of
2 Plaintiffs' RICO claims. First, "it will be difficult to ascertain the amount of
3 [Plaintiffs'] damages attributable to [Herbalife's] wrongful conduct." *Philip Morris*,
4 241 F.3d at 701. Here, like in *Trump*, in order to "assess with accuracy the losses
5 attributable to" Herbalife, "the factfinder would first need to determine the extent to
6 which Plaintiffs' payments to [Herbalife and third-party distributors] . . . were
7 induced by [Herbalife]," as opposed to third parties like the Featured Speakers.
8 *Trump*, 385 F. Supp. 3d at 281. Then, "after subtracting monies recouped [by
9 Plaintiffs], the factfinder would need to reduce the loss further by the extent to
10 which Plaintiffs' inability to recover their costs was attributable to Plaintiffs' sales
11 abilities and networks, [Herbalife and the Featured Speakers'] business practices,
12 the demand for [Herbalife] products in Plaintiffs' localities, and the inherent
13 difficulties of succeeding in multi-level marketing ventures, among other factors."
14 *Id.* This would be an unworkably complex analysis.

15 Further, like in *Trump*, Plaintiffs allege that they were convinced to attend
16 events and pursue the business opportunity by third parties, including what appear to
17 be private conversations Plaintiffs had with their "mentors." *See, e.g.*, Dkt. 202 at
18 ¶¶ 164, 166, 167, 170, 179, 182, 184, 188-191. Plaintiffs also allege that
19 distributors "remix[]" and "repackage[]" over social media innocuous fliers
20 detailing the date, location, and price of a given event. Dkt. 202 at ¶¶ 120-21; *see*
21 *also, e.g.*, Dkt. 202 at ¶ 122 (alleging one such instance of distributor activity on
22 social media), ¶ 126 (alleging that a Featured Speaker posted a "meme" on
23 Facebook, which was then "shared more than sixty times."), ¶ 129 (alleging that
24 a Featured Speaker posted a message to a "*private* Facebook group") (emphasis
25 added), ¶ 154 (alleging 6,000 Instagram posts made by distributors).

26 That a factfinder would need to both (a) engage in a "complex assessment" to
27 ascertain what portion of Plaintiffs' losses are attributable to their attendance at
28 events, as opposed to other factors inherent in the business opportunity and

(b) disentangle who made the aforementioned representations, and what Herbalife's role was, if any, in those representations, "compels the conclusion that the [Amended Complaint] does not sufficiently plead proximate cause." *Anza*, 547 U.S. at 459; *Trump*, 385 F. Supp. 3d at 281; *see also Titan Glob. LLC v. Organo Gold Int'l, Inc.*, No. 12-CV-2104-LHK, 2012 WL 6019285, at *8 (N.D. Cal. Dec. 2, 2012) ("Even if Plaintiffs adequately allege the three purported acts of interstate wire fraud, it will be difficult to ascertain the amount of damages attributable to this wrongful conduct.").

Second, the court will "have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Philip Morris*, 241 F.3d at 701. Because Plaintiffs have made identical allegations and asserted identical claims against 44 distributors (some of whom are "Featured Speakers" here) in a case that is pending in the Southern District of Florida, there is no way to avoid the very type of "intricate, uncertain inquiries" that the "element of proximate causation . . . is meant to prevent." *Anza*, 547 U.S. at 460. In order to avoid the possibility that Plaintiffs seek multiple and duplicative recoveries in this case and in the Florida action, the Court must dismiss Plaintiffs' RICO claims.

3. Plaintiffs' RICO Conspiracy Claim Fails.

As the Court held in its Order, a failure to plead a substantive claim under RICO requires dismissal of the related conspiracy claim. *See* Dkt. 196 at 10; *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) ("The failure to adequately plead a substantive violation of RICO precludes a claim for conspiracy."). The Court must therefore dismiss the RICO conspiracy claim.

B. Plaintiffs' Claim for Negligent Misrepresentation Fails.

The Court held that Plaintiffs' claim for negligent misrepresentation is subject to Rule 9(b)'s heightened pleading standard. *See* Dkt. 196 at 14-15; *see also Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999) ("Claims for fraud and negligent misrepresentation must meet the heightened

1 pleading requirements of Rule 9(b).”). For the reasons discussed above, Plaintiffs
2 fail to plead their fraud allegations with specificity; therefore, their claim for
3 negligent misrepresentation must be dismissed.

4 Further, the Amended Complaint does not even plead *as to the named*
5 *Plaintiffs* the specific representations made by Herbalife that induced them to attend
6 events. *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1089 n.2 (1993) (“Negligent
7 misrepresentation . . . requires plaintiffs to plead and prove *actual reliance* just as in
8 a claim for intentional misrepresentation.”) (emphasis added). Putting aside whether
9 the Amended Complaint adequately pleads representations that the class may have
10 relied upon (it does not), class-wide allegations are not a substitute for specific
11 allegations as to the four named Plaintiffs. As to the benign promotional materials
12 from Herbalife that Plaintiffs contend they received (*see* Dkt. 202 at ¶¶ 102, 103,
13 105, 107, 109), Plaintiffs do not even allege that they read those materials (or in the
14 case of Exhibit 14, attended the alleged conference call), attended the events being
15 promoted by those materials, or attended those events in reliance on the promotional
16 materials. Their lack of actual reliance bars Plaintiffs’ negligent misrepresentation
17 claim.

18 Plaintiffs’ allegations that the Featured Speakers misrepresented the manner
19 in which they achieved success, without more, cannot form the basis for a negligent
20 misrepresentation claim against Herbalife. *See Swartz*, 476 F.3d at 765.

21 **C. Plaintiffs’ Claim Under California’s Unfair Competition Law Fails**
22 **for the Same Reasons.**

23 Plaintiffs’ UCL claim fails because the underlying fraud is not sufficiently
24 pled. First, the claim fails because the misrepresentations on which it is based are
25 not pled with specificity under Rule 9(b). *See* Dkt. 196 at 13; *see also Vess v. Ciba-*
26 *Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (“It is established law, in
27 this circuit and elsewhere, that Rule 9(b)’s particularity requirement applies to
28 state-law causes of action.”). Second, Plaintiffs also fail to specifically allege the

1 representations made by Herbalife on which they each relied in attending events.

2 **D. The Amended Complaint Should Be Dismissed Without Leave to**
3 **Amend.**

4 A “district court’s discretion to deny leave to amend is particularly broad
5 where plaintiff has previously amended the complaint.” *Ascon Properties, Inc. v.*
6 *Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). Further amendment would be
7 futile here for several reasons.

8 First, Plaintiffs bluntly failed to address the deficient allegations noted by the
9 Court in its Order. *See Curry v. Yelp Inc.*, 875 F.3d 1219, 1228 (9th Cir. 2017)
10 (affirming district court’s dismissal of first amended complaint with prejudice,
11 noting that “[i]n the district court’s first order dismissing Plaintiffs’ complaint with
12 leave to amend, it pointed out deficiencies in Plaintiffs’ pleadings of materiality,
13 falsity, loss causation, and scienter. Despite these explicit warnings, Plaintiffs’ first
14 amended complaint failed to remedy the deficiencies.”).

15 Second, as discussed above, Plaintiffs “assertion of a fraudulent scheme is
16 irredeemably contradicted by” Herbalife’s speaker guidelines, attached as an exhibit
17 to the Amended Complaint. *Matthews v. San Diego Cty. Bd. of Supervisors*,
18 No. 3:18-CV-711-GPC-NLS, 2019 WL 4039651, at *10 (S.D. Cal. Aug. 27, 2019)
19 (finding futility in dismissing complaint with prejudice).

20 Third, having had over a year to conduct discovery, some of which is
21 referenced in the Amended Complaint, there is no reason to believe that there is any
22 additional information Plaintiffs possess that could be used to remedy their
23 insufficient allegations.

24 Ultimately, Plaintiffs effectively have had three opportunities to file a well-
25 pled complaint: (1) over two years ago at the outset of the case; (2) over a year ago
26 when their claims against only Herbalife were transferred to this Court; and (3) after
27 the Court dismissed the original complaint without prejudice. Plaintiffs should not
28 be afforded a fourth chance to amend their deficient allegations.

1 **IV. CONCLUSION**

2 Based on the foregoing, Herbalife respectfully urges the Court to grant its
3 motion, and dismiss the Amended Complaint with prejudice.

4
5 DATED: November 26, 2019

Respectfully submitted,

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10
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